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Appeals for the Fourth Circuit, at Richmond, Virginia, being No. 2577, the short style of which is the Liberty National Bank of Roanoke, Va., v. Bear, Trustee, wherein said bank was appellant and said trustee was appellee, and in which a final decree was entered on February 28th 1927, affirming the decision of the District Court.

This case arises in proceedings in bankruptcy where the amount in controversy exceeds the statutory requirement of $2000.00, and where the determination of the questions involved in the rejection of the priority claimed by the bank on its judgment against the individual estates is essential to an uniform construction of the Bankruptcy Act throughout the United States.

A BRIEF STATEMENT OF THE MATTER INVOLVED:

This case has been before this Court before, and reference is made to 256 U. S. 365, and 268 U. S. 693. In the first decision, this Court reversed the Circuit Court of Appeals (285 Fed. 703) and remanded the cause. This reversal was because the trustee had failed to aver or prove that the bankrupts were insolvent at the time the bank's judgment attached.

When the case was remanded the trustee was allowed by the learned District Judge to amend and allege insolvency, and take proof thereon. This was assigned as error, and the bank's second petition for certiorari to the decision of the Circuit Court was denied. (268 U. S. 693).

The trustee then filed before the referee supplemental and amended objections to the allowance of the bank's judgment as a secured or prior claim against the individual estates of Becker, Sr., and Jr., and alleged that the two partnerships of Becker & Co., and the Roanoke Provision Co., and Becker Sr. and Jr., who were the sole partners in

the two partnerships, were insolvent at the time the bank's judgment was obtained and docketed, and on the date the bank's suit, was instituted. (Record page 2).

The bank demurred to the supplemental and amended objections of the trustee, and moved to dismiss the same. (Record 5, 8)

After the taking of evidence on the question of insolvency, counsel for the trustee and for the bank stipulated that all of said persons and firms were insolvent when the bank's judgment was obtained and when it was docketed.

The referee held that he was bound by the decision of the Circuit Court of Appeals rendered in this cause on December the 21st, 1922, (285 Fed. 703), which held that the adjudication of the partnerships was ipso facto an adjudication of the individuals, and that the decision of this Court 265 U. S. 365) had not reversed the Circuit Court on this point. (Record 22).

The bank assigned error to the referee's decision (Record 25) and the case was appealed to the District Court and thence to the United States Court of Appeals, each of which courts sustained the ruling of the referee as above briefly set out, and upon the same ground, the decision of the Circuit Court, having been rendered on February the 28th 1927.

GENERAL REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

Your petitioner very earnestly urges that the final decree of the Circuit Court is rerroneous, and contrary to the true construction of the Bankruptcy Act, and relies upon the following grounds for the issuance of said writ and the granting of its petition.

(1) The learned Judges of the Circuit Court erred in not sustaining the bank's demurrer and motion to dismiss.

(2) Said Court erred in not holding that its first decision was reversed by the decision of this Court rendered on May the 26th, 1924. Said Court erred in again holding that the adjudication of the partnerships was ipso facto an adjudication of the individuals composing same. The individuals has committed no act of bankruptcy and were not parties defendant to the involuntary petition against the partnerships.

(3) Said court erred in holding that the bank's judgment against the individual partners had been dissolved, when this judgment was more than nine months old at the time the individual partners were adjudicated bankrupts on their voluntary petitions.

(4) The Circuit Court erred in holding that the decision of this Court in Meek v. Centre County Banking Co., 268 U. S. 426, is not decisive of this case favorably to the bank, and said court erred in holding that its previous decision remained the law of the case.

Your petitioner presents herewith a certified transcript of the record, and respectfully prays that a writ of certiorari be issued to the end that said cause may be reviewed and determined by this Honorable Court as provided for by law, and that the said decision of the United States Circuit Court of Appeals for the Fourth Circuit may be reversed, and that your petitioner have such other and further relief in the premises as to this Court may seem just and proper.

THE LIBERTY NATIONAL BANK of Roanoke, Virginia, a Corporation,

By Its Counsel;

JAS. D. JOHNSTON.

STATE OF VIRGINIA,

To-Wit

CITY OF ROANOKE,

Jas. D. Johnston, being duly sworn, deposes and says that he is counsel for the above named Petitioner, and says that the matters in the foregoing petition are true to the best of his knowledge and belief.

Subscribed and sworn to before me this the 26th day of March, 1927.

M. N. RONALD,

Notary Public.

[SEAL]

I do hereby certify that the foregoing petition is presented in good faith, and not for the purpose of delay, and that in my opinion this case is a proper one for the issuance of the writ of certiorari prayed for.

JAS. D. JOHNSTON,

Counsel for the Petitioner.

Supreme Court of the United States

OCTOBER TERM 1926.

THE LIBERTY NATIONAL BANK OF ROANOKE, VIRGINIA, A Corporation, Petitioner,

v.

JAMES A. BEAR, TRUSTEE IN BANKRUPTCY OF W. L. BECKER & COMPANY, and ROANOKE PROVISION COMPANY, and W. L. BECKER, SR., and W. L. BECKER, JR., Individually, Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTORARI

STATEMENT OF THE CASE

We refer to the Petitioner as the Bank, and the Respondent as Trustee, and O. R. and R., for Original Record and Records.

The facts nesessary to a correct decision are briefly these:

1. The partnerships of Becker & Co., and the Roanoke Provision Co., composed of only two partners, Becker,

Sr., and Jr., committed an act of bankruptcy by making a general assignment.

2. Partnership creditors filed an involuntary petition against the two partnerships, (R. 11, 14), and alleged that the making of the general assignment was an act of bankruptcy, and prayed that subpoenas might be served upon the partnerships and that the partnerships of Becker & Co., and the Roanoke Provision Co., might be adjudged bankrupts.

The individual partners had committed no act of bankruptcy, and as individuals were not served with process in the involuntary petition against the partnerships.

3. The partnerships were adjudged bankrupts for making the general assignment, but the individuals were not, the Court refusing to so adjudge the individuals in the partnership proceedings, and no appeal being taken from the refusal to so adjudge the individuals. (O. R. 67).

4. The Bank recovered its judgment against the Roanoke Provision Co., and also against W. L. Becker, Sr., and Jr., individually, on July 30, 1920. (R. 11). Becker, Sr., and Jr., were adjudicated individually on their voluntary petitions on April 28th, 1921, (R. 13).

5. Partnerships creditors elected the partnerships' trustee, and individual creditors elected the same person trustee of the individual assets.

6. There was no surplus from the individual assets to be applied to partnership debts, nor vice versa. (O. R. 34, Sec. 18).

7. In the printed composition offered the partnership creditors in the bankruptcy proceedings against the part-

nerships, the individual partners made it plain that as individuals they were not in bankruptcy, and that no discharge was sought from individual debts. (O. R. top of page 31).

ASSIGNMENTS OF ERROR AND ARGUMENT

(a) The assignments of error present to this Court for its decision whether Becker, Sr., and Jr., individually, were adjudicated bankrupts within four months next following the attaching of the lien of the Bank's judgment. We respectfully submit that there was no adjudication of Becker, Sr. and Jr., individually, until the Bank's judgment was more than nine months old.

The learned District Judge has clearly set forth in his order and opinion, that the partnerships alone, and not the individuals, were adjudicated bankrupts on the involuntary petition filed by Runkle & Company, et al. On page 52 of the original record, this learned Judge says: "Whatever may be thought of the petition, it is certain that the order of adjudication does not declare the individuals to be bankrupt."

On page 24 of the original record, paragraph 4, a quotation is made from the printed composition filed in the bankruptcy proceedings aginst the partnerships, and it is here that W. L. Becker, Sr. and Jr., say:

"No petition for bankruptcy has been filed by or against such individuals, and no discharge of such individual debts so listed as individual debts is sought."

(b) The Circuit Court erred in holding that the adjudication of the partnerships was ipso facto an adjudication of the individual partners. This decision entirely ignores the doctrine that a partnership may be adjudicated

a bankrupt as a separate entity, and this decision is in confilct with the plain language of the Bankruptcy Act, and the decisions of this Court.

The learned Judges of the Circuit Court seems to have lost sight of the fact that the District Court refused to adjudicate the individuals in the Bankruptcy proceedings and that later the individuals on their involuntary petitions were adjudicated. It seems manifest, from the order of adjudication in the partnership proceedings, and from the language and conduct of the individual partners as above set out, that there was no adjudication of the individuals until the Bank's judgment was more than nine months old.

(c) We respectfully submit that the decision of his Honorable Court in Meek v. Centre County Banking Co., 268 U. S. 426, has settled in the affirmative the vexed question as to whether a partnership can be adjudicated a bankrupt as a separate entity, independent of an adjudication of the individual partners. This being true, the learend Judge of the District Court was correct in adjudicating the partnerships alone on the petition of Runkle & Company, and in refusing to adjudicate the individuals in the same proceedings. It also follows, that the individuals, not having been adjudicate until the Bank's judgment was more than nine months old, that the lien thereof against the individual assets cannot be annulled.

The case of Myers et al v. International Trust Co., decided by this Court on February 21st, 1927, (Advance Sheet, Supreme Court Reporter, March 15, 1927, p. 372-3-4), further sustains the position for which we contend, and is an additional authority for the doctrine that a partnership may be proceeded against as a legal entity.

(d) In order to avoid the Bank's judgment against the individuals, the Trustee must show that the individuals

were adjudicated within four months next following the attaching of the Bank's judgment. Black on Bankruptcy (3rd Ed) p. 1246. This the Trustee has not done.

It is wholly unnecessary for the Bank, in order to prevail in this case, to do more than bring to the attention of this Court that its judgment against the individuals was more than nine months old when they were adjudicated bankrupts. This the Record plainly and clearly shows. To reach any other conclusion would be to wholly ignore the undisputed facts of the Record.

The question of insolvency is eliminated, and need not be referred to, except to say: That as this Honorable Court in its former decision correctly held that the Trustee must both allege and prove insolvency, so it is equally essential that he allege and prove that the individuals in their individual capacities, and not as a partnership, were adjudicated within four months next following the attaching of the Bank's lien. This the Trustee cannot do, because, there are no facts upon which to base such an allegation, or to prove the same.

If it be argued by the Trustee that the individual assets were before the court in the partnership proceedings, the reply is, that this is not sufficient. **Assets before a court do not constitute an adjudication of the owner.**

Furthermore, it would be a most harmful decision to hold, that a bankrupt court, where there had been no adjudication of the individual partners, and where there was no surplus, as in this case, of individual assets above individual liabilities, would undertake to distribute the individual assets. The correct principle, as we believe, is laid down in Dickas v. Barnes 140 Fed. 849; 15, A. B. R. 566, where it is held, that the court "may take possession of and administer the property of one of the members whom

it could not adjudge bankrupt, **so far as necessary in the settlement of the partnership assets.**" ..In the instant case it is admitted that there will be no individual assets to be applied on partnership debts, and so it would be quite unnecessary for the Court in the partnership proceednigs to attempt to administer the individual assets. Such an attempt, we are thoroughly convinced, would be contrary to the well established doctrine that individual assets must be applied first to individual liabilities.

(e) The Trustee occupies the anomalous position of seeking as trustee of the partnerships to avoid the Bank's judgment, when he admits that if the whole of the Bank's judgment is collected from the individual assets it will not diminish by one penny the amount to be paid partnership creditors. Partnership creditors, therefore have no just ground to complain and connot legally attack the Bank's judgment against the individuals.

Again, the Trustee for the individuals is estopped to attack the Bank's judgment against the individuals, because all his authority is by virtue of an adjudication of the individuals, which is admitted to have been more than nine months subsequent to the attaching of the Bank's lien against the individuals.

It follows then, that in neither capacity can the Trustee avoid the Bank's judgment against the individuals. The same is true of both partnership and individual creditors. Neither class of creditors has any legal ground to attack the Bank's judgment and it remains a valid and existing lien against the individual assets, and the decision of the Circuit Court of Appeals to the contrary should be reviewed and reversed.

Wherefore, it is respectfully submitted that this petition should be granted and a writ of certiorari issued as prayed for.

JAS. D. JOHNSTON,

Counsel for the Petitioner.

Office Supreme Court, U. S.
F I L E D
SEP 21 1927

Supreme Court of the United States

October Term 1927

NO. 218

LIBERTY NATIONAL BANK OF ROANOKE, VIRGINIA,
Petitioner

VERSUS

AMES A. BEAR, TRUSTEE IN BANKRUPTCY OF THE
STATE OF W. L. BECKER, SR., AND W. L. BECKER,
R., PARTNERS, ETC., AND AS TRUSTEE OF W. L.
ECKER, SR., AND W. L. BECKER, JR., BANKRUPTS,
Respondent

On Writ of Certiorari to the United States Circuit Court
of Appeals for the Fourth Circuit

BRIEF OF COUNSEL FOR RESPONDENT

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Respondent

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourt Circuit.

BRIEF OF COUNSEL FOR RESPONDENT

For the sake of convenience, we will in this brief designate the Petitioner as the Bank and the Respondent as the Trustee.

STATEMENT OF THE CASE

The proceedings had in this matter are stated at such length in the former records filed in this court and in the Circuit Court of Appeals for the Fourth Circuit, that we deem it unnecessary in this statement to again set out in detail all of the facts and proceedings had in the matter, except to state that on July 20th, 1920, the Bank recovered in the Corporation Court for the City of Roanoke, Virginia, a judgement against W. L. Becker and W. L. Becker, Jr., partners trading as the Roanoke Provision Company, and also against W. L. Becker and W. L. Becker, Jr., individually, which judgment was duly docketed on the 31st day of July, 1920, in the Clerk's Office of said Court. This judgment was for $5,566.05, with interest, attorneys fees and costs. The judgment was recovered on an ordinary homestead waiving note, made by W. L. Becker and the Roanoke Provision Company, and endorsed by W. L. Becker and W. L. Becker, Jr., individually, the Roanoke Provision Company being a partnership composed of W. L. Becker and W. L. Becker, Jr.

On August 6th, 1920, an involuntary petition in bankruptcy was filed in the Clerk's Office of the District Court of the United States for the Western District of Virginia, by Runkle & Company and others, against W. L. Becker and W. L. Becker, Jr., partners trading as W. L. Becker & Company and the Roanoke Provision Company, the petitioner alleging that an act of bankruptcy had been com-

mitted on August 4th, 1920, by the execution by the partnerships of a general Deed of Assignment to a Trustee for their creditors, the partitioner alleging that both partnerships were insolvent.

On August 7th, 1920, W. L. Becker and W. L. Becker, Jr., filed in said Clerk's Office their joint answer to the petition, admitting its allegations, this answer being signed by them in their individual capacities, and in which they waived process and admitted all the allegations of the petition.

On August 20th, 1920, the partnerships of W. L. Becker & Company, and the Roanoke Provision Company were adjudged bankrupts and the case referred to R. Q. Mosby, Referee, who directed the bankrupts to appear, and who on August 23rd, 1920, entered an order reciting the adjudication of the partnerships as bankrupts and directing that they file the requisite schedule in partnership bankruptcy proceedings on or before the 2nd day of September, and also directing that they file, on or before said date, lists of their individual assets and liabilities, which schedules and lists were duly filed.

Several meetings of the creditors were had and on September 25th, 1920, the partnership offered to their creditors a composition of 20 per cent. Various meetings of the creditors were had on this offer of composition, at which meetings a majority in number and amount of creditors accepted the offer of composition, but the Bank opposed it, counsel for the Bank at the meeting stating that the Bank was opposed to the composition on the ground that the real estate owned by the individuals would be mortgaged in order to raise the money to pay the composition offered.

Further proceedings were had on this offer of composition from time to time until November 29th, 1920, on

which date the partnership amended their offer of composition. Various meetings of the creditors were then held from time to time to consider this amended offer of composition until finally at a meeting held December 23rd, 1920, a majority of creditors in number and amount voted favorably on the composition, but the Bank again renewed its objection on the same ground, and finally on January 3rd, filed in writing the same objection to the composition. Further proceedings were had in the matter from time to time before the Referee, and finally the matter was heard before the District Court on April 20th, 1921, when said court entered an order sustaining the objections of the Bank to the composition, and rejecting the offer.

Since the offer of composition made by the partnerships had been acted upon unfavorably on April 27th, 1921, W. L. Becker, Sr., and W. L. Becker, Jr., filed their voluntary petitions in bankruptcy with the requisite schedules and on April 28th, 1921, they were adjudged bankrupts individually.

On May 16th, 1921, appelle, James A. Bear, was elected Trustee for the two partnerships and for W. L. Becker Sr., and W. L. Becker, Jr., as individuals, and then proceeded with his administration of all four estates.

During these proceedings which had been extended from August 6th, 1920, until April 27th, 1921, the Bank filed two proofs of debt, the first on December 23rd, 1920, alleging that the Roanoke Provision Company was indebted to it in the sum of $5,566.99 with interest and certain attorneys fees, but that said bank had received no security for this debt. The second proof which was filed on January 6th, 1921, was also filed against the Roanoke Provision Company, alleging the same debt and alleging further that since the bank's judgment was against both the partnerships and the individuals composing it, and was over four

months old as to the individuals the Bank would claim that the judgment was a valid lien on the individual real estate of the partners. In addition to these two proofs on May 31st, 1921, the bank filed two proofs of claim, one against W. L. Becker, Sr., and another against W. L. Becker, Jr., alleging practically the same facts as were alleged in the proofs filed on January 6th, 1921, and in these two proofs again asserted that the judgment was over four months old as to the real estate of the individual partners, and was hence a secured claim. It will thus be observed that not until after four months had elapsed after the filing of the petition against the partnership did the Bank by any pleading assert that this judgment was a prior or secured claim.

The Trustee sold the entire partnership assets, which only brought the sum of $908.08, this amount being insufficient to pay even the costs of administration, and no dividend will be declared to the partnership creditors. The Trustee also sold the individual assets of W. L. Becker, Sr., bringing the sum of $11,786.00, from which a mortgage indebtedness of $2,708.36 was paid; the assets of W. L. Becker, Jr., bringing the sum of $8,832.00 from which a mortgage indebtedness of $3,257.68 was paid, thus leaving $8,077.64 payable to the individual creditors of W. L. Becker, Sr., and $5.574.32 payable to the individual creditors of W. L. Becker, Jr., which after the payment of the costs of administration, will not be sufficient to pay their individual indebtedness.

The case was heard before the Referee on these various proofs of claim of the Bank and objections by the Trustee, to the allowance of the same as secured claims against the proceeds of sale of the real estate owned by the individual partners. On the issue thus raised on December 9th, 1921, the Referee filed a written opinion (Record this Court No. 238, October Term, 1923, page 38) and

entered an order declaring that said claims were disallowed as secured claims, but were allowed as unsecured claims. To this order of the Referee the Bank prosecuted an appeal and petition for review to the District Court who by an order entered May 23rd, 1922 (Record No. 238, October Term, 1923, this court, page 53) reversed the order of the Referee and allowed the claims of the Bank as secured claims against the proceeds of the sale of the real estate of the individual partners.

To this decision of the United States District Court the Trustee prosecuted an appeal to the United States Circuit Court of Appeals for the Fourth Circuit, who reversed the order of the District Court (285 Fed. page 703). To this decision of the Circuit Court of Appeals the Supreme Court of the United States awarded a writ of certiorari on which the cause was heard and upon the hearing the decision of the United States Circuit Court of Appeals was reversed and the cause remanded to the District Court for the Western District of Virginia. (See Liberty National Bank v. Bear, Trustee, 265 U. S. 365, 44 S. Ct. 499, 68 Led. 1057).

The decision of the Supreme Court did not pass upon the merit of the cause however and upon the mandate of the court reaching the District Court the Trustee applied to the District Court for and was granted leave to amend the pleadings by filing amended objections to the claims of the Bank and thus determine by evidence introduced the question of whether or not the judgment debtors were in fact insolvent at the time the judgment was recovered and docketed.

To the decision of the District Court allowing the amendment of pleadings the Bank prosecuted a petition to Superintend and Revise to the Circuit Court of Appeals

Fourth Circuit. This court affirmed the decision of the District Court, (See Liberty National Bank of Roanoke v. Bear Trustee 4 Fed. (2nd) Page 240) and a writ of certiorari to said decision of this court was denied by the Supreme Court April 27th, 1925. (See 268 U. S. 693, 45 S. Ct. Rep. 512).

After the Supreme Court had denied the last mentioned certiorari evidence was taken upon the issue of insolvency presented by the amendment of pleadings and the proof showing conclusively that all of the judgment debtors were insolvent at the time the judgment was recovered it was at the conclusion of the taking of the evidence so stipulated by counsel and found as a fact by the Referee to who the question was referred. (See present record this court No. 32,598, Pages 9 and 21).

The Referee after finding as a fact that the judgment debtors were insolvent when the judgment was obtained, adhered to this first decision in the case which was the same as that of the Circuit Court 285 Fed. 703, and hence entered an order overruling the Banks demurrer and motion to dismiss and disallowing the Bank's claims as secured claims, but allowed them as unsecured claims. (Present record No. 32,598, Page 22).

To this decision of the Referee the Bank prosecuted an appeal and motion to Review to the District Court who affirmed the decision of the Referee. (Present record Page 25).

To the decision of the District Court the Bank prosecuted an appeal to the Circut Court of Appeals Fourth Circuit, who affirmed the District, 18 Fed. (2nd), Page 281, holding that its first decision (285 Fed. 703) was the law of the case. The opinion of the late Judge Rose who wrote the last opinion is found in the present record of this Court,

Page 29.

To the last decision of the Circuit Court the Bank was allowed a writ of certiorari upon which the cause is now before this Court.

Briefly stated the situation is now as follows: The Circuit Court decided 285 Fed. 703, that the Bank's lien was annulled although it expressed no opinion on the question of insolvency stating that insolvency seemed to have been assumed in the court below. This Court 265 U. S. 365 reversed the Circuit Court, not upon the principles of the cause, however, but because it regarded the question of insolvency as material, and remanded the cause for further proceedings. These further proceedings have now been had and have resulted in it being established beyond further controversy that all the judgment debtors were insolvent when the judgment was recovered, which had been assumed by the Circuit and District Court upon the first appeal.

The cause is hence before this Court for the second time but now upon its ultimate merits without any question of evidence of insolvency being involved.

The Trustees contentions are summarized in the following brief of argument:

BRIEF OF THE ARGUMENT

I.

The filing of the petition against the partnerships and adjudication thereon carried into bankruptcy the members of the partnerships as individuals, because:

(a) The partnerships and the individual members

were in fact insolvent when the judgment was recovered as was always contended and which has since been admitted and adjudicated.

(1) District Court adjudicated partnerships bankrupts.

(b) The adjudication of the partnership was in effect an adjudication of the individual members.

Section 5 of the Bankruptcy Act.
General Order in Bankruptcy No. 8,
Francis v. McNeal, 228 U. S. 695; 57 Led. 1029,
In re: Meyers, 98 Fed. 976,
Dickas v. Barnes, 140 Fed. 849,
Vacarro v. Security Bank, 103 Fed. 436,
Liberty National Bank v. Bear, Trustee 285 Fed. 703.

II.

The assets of the individual partners being drawn into bankruptcy by the adjudication of the firm, Congress intended that such assets be distributed in accordance with the principles and rules of the Bankruptcy Act which prevent the perfection of liens thereon, preferences, or an inequitable marshalling of the partnership and individual estates, which is shown by:

(a) The provisions of the Act and its construction by the Federal Courts,

Section 5 of the Bankruptcy Act, Clause b through g,
In re: Meyer, 98 Fed. 976,

Dickas v. Barnes, 140 Fed. 849
Francis v. McNeal (3rd Circuit), 186 Fed. 481

Black on Bankruptcy (1922 Ed.), page 110
Vacarro v. Security Bank, 103 Fed. 436.

(b) The construction placed upon the Act by this Court

Francis v. McNeal, 228 U. S. 695; 57 Led. 1029
Miller v. New Orleans Acid Fertilizer Co., 221 U. S. 496
General Order in Bankruptcy No. 8.

III.

Litigation was pending over the composition offered by the partnership and pending decision of this question no liens could be perfected against property of the individual estates which would prevent an equitable distribution of the property of the several estates.

IV.

The assignments of error should be overruled for the reasons stated in the brief of the argument and the further reasons:

(1) Section 67c and 67f are to be considered and construed in connection with the other provisions of the Bankruptcy Act.

(2) The Trustee in this case is the representative of the four estates which are now in bankruptcy.

(3) There are other creditors of the individuals estates who have the right to object to the Bank's claim being a secured claim, even if it be assumed that the Bank is classified as an indi-

vidual creditor. The Referee held and it was stipulated by counsel for the Bank that if the Bank's judgment is allowed as a secured claim it will enable the Bank to obtain a greater percentage of its debt than other individual creditors. (Present Record, Page 9, paragraph 5, and page 21, paragraph 5.)

(4) The demurrer and motion to dismiss filed by the Bank present the same questions as are presented by the other assignments of errors and said demurrer and motion were properly overruled for the reasons stated in the brief of the argument.

(5) No error was committed by the Circuit Court in holding, 4 Fed. (2nd) 240, that its first decision (285 Fed. 703) was not reversed by the decision of this court (265 U. S. 365) because the writ of certiorari to the decision of said Circuit Court was refused by this Court (268 U. S. 693).

(6) No error was committed by the Circuit Court in holding generally that the adjudication of a partnership is ipso facto an adjudication of the individual partners, but regardless of the correctness of such holdings as a general proposition of law in the case at bar such holding was proper for the reason stated under sections II. and III. of the brief of the argument.

V.

The authorities cited in the brief of counsel for the Bank are not in point.

ARGUMENT

Briefly the contention of the Bank in this case is that its judgment which was recovered both against the partnership and the individuals composing it, and which was docketed in the proper State Clerk's Office on July 31st, 1920, is a lien on the property of the individuals, because said individuals were not adjudicated bankrupts until April 28th, 1921, some eight months later. The Bank taking the position that a partnership is a legal entity distinct from the individuals composing it, and that the adjudication of the firm as a bankrupt had no effect upon liens acquired on the properties of the individual partners.

On the other hand, the Trustee contends that the partnership composed of exactly the same individuals having been adjudicated a bankrupt on August 20th, 1920, (less than one month from the docketing of the Bank's judgment) that this adjudication of the partnership brought the estates of the individuals composing it under the juridiction of the bankruptcy court to such an extent that no liens could be perfected thereon, and that the judgment in question is hence annulled.

The foregoing respective contentions of the parties are for the Trustee summarized in the Brief of Argument, while those of the Bank are contained in four general reasons relied upon for allowance of the writ, numbered 1, 2, 3, and 4 found on page 4 of the petition for the writ and five assignments of error designated as a, b, c, d and e respectively found on pages 8 to 11 both inclusive of the Brief in Support of the Petition for the writ. Since,however, the questions presented in our Brief of Argument and those presented by the assignments of error are so closely related, in the interest of brevity we will discuss these assignments of error along with the reasons advanced by us for the affirmance of the decision of the learned

Circuit Court.

I.

THE FILING OF THE PETITION AGAINST THE PARTNERSHIP AND ADJUDICATION THEREON CARRIED INTO BANKRUPCY THE MEMBERS OF THE PARTNERSHIP AS INDIVIDUALS.

(a) In this case the petition in bankruptcy against the partnership allege that they were insolvent. All of the members of the partnership filed their answer and admitted the allegations of the petition. Twenty-one days thereafter the District Court **adjudicated** the partnership bankrupt. The Referee found that the partnership assets would not be sufficient to pay the partnership debts, and the individual assets would not be sufficient to pay the individual creditors. In the subsequent proceedings had upon the question of insolvency evidence was taken upon the question and at the conclusion of the taking of the evidence it being so clearly manifested that both the partnership and the individuals composing it were insolvent, the fact was admitted, stipulated by counsel and later so found as facts by the Referee. (See Present Record No. 32,598, Pages 9 and 21).

The adjudication in this case, therefore, having been upon an act of bankruptcy where the elements of insolvency were present it follows that;

THE ADJUDICATION OF THE PARTNERSHIP WAS IN EFFECT AND ADJUDICATION OF THE INDIVIDUAUL MEMBERS

(b) The Bankruptcy Act, Section 5, Cause B, through G, provides how both individual and partnership estates are to be administered for the benefit of the creditors.

Clause G Provides that:

"The court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all of the partners and of the administration of the partnership and individual property."

Clause F Provides that:

"The net proceeds of the partnership property shall be appropriated to the payment of partnership debts and the net proceeds of the individual estate of each partner to the payment of his individual debts; should any surplus remain of the property of any partner after paying his individual debts such surplus shall be added to the partnership assets and be applied to the payment of partnership debts."

Clause G Provides that:

"The court may permit the proof of the claim of the partnership estate against the individual estates and vice versa, **and may marshal the assets of the partnership estates and individual assets so as to prevent preferences and secure the equitable distribution of the property of the several estates." (Bold face type ours.)**

The intention of Congress by the inactment of Section 5, Clause B Through G was to afford facilities for equitable distribution of the several estates and to this end it granted to the Supreme Court of the United States the right to prescribe a procedure in bankruptcy. The Supreme Court in General Order No. 8 provides:

"Such partner shall be required to file a schedule of his debt and inventory of his property in the same manner as is required by the Act in case of debtors against whom

adjudication of bankruptcy shall be made."

In this case the referee followed the conventional procedure. (Record this Court No. 238, October Term, 1923, Page 17). He directed that the two partners, who alone composed the partnership should file lists of their respective assets and liabilities. This the partners did on August —, 1920, and from that moment, with their consent, their estates were under the jurisdiction of the bankruptcy court for distribution of their properties among the several classes of creditors.

The intention of the bankruptcy act was not to create new rights between the partners and their creditors, but was to so marshal and so administer the several esates in bankruptcy as would leave intact the common law rights of all parties concerned. As was said in the case of In re: Meyer, 98 Fed. 976:

"By the provisions of Section 5 of the bankruptcy act a partnership during the continuance of its business or after its dissolution and before final settlement of its business may be adjudged a bankrupt and jurisdiction of all the partners and the administration of the partnership and individual property is conferred upon any court of bankruptcy having jurisdiction of one of the partners."

"We are of the opinion that it is the scheme of these provisions to treat the partnership as an entity which may be adjudged a bankrupt by voluntary or involuntary proceedings, irrespective of any adjudication of the individual partners as bankrupt, and upon an adjudication to draw to the administration the individual estates of the partners as well as the partnership estate, and marshal and distribute them accordingly to equity."

To the same effect is the case In re: Stokes, 106

Fed. 312, which holds under the Bankruptcy Act of 1898, Section 5:

"The adjudication of a partnership as a bankrupt draws to the court of bankruptcy for administration the individual estates of the partners though they are not adjudged bankrupts individually and such court may require an assignee for the benefit of creditors of one of the partners to surrender the assigned property to the Trustee of the partnership by a summary order, since such assignee does not hold adversely but in the right of his assignor."

In the case of Dickas vs. Barnes, 140 Fed. 849, certain members of a partnership objected to the court taking charge of their estates on the ground that they were wage earners and farmers and not subject to proceeding in bankruptcy. The court, however, held that one who becomes a member of a partnership may become subject to the exercise of the powers **of a court of bankruptcy where the resources of the partnership will be gathered to satisfy the claims of the creditors.** That these are **consequences of the parnership relation,** and are not derived from the bankruptcy act. That if bankruptcy does not supervene the rights of the parties will be worked out by a court of general jurisdiction and the partner would be a party, a **necessary party to the record** so that his liability for the firm debts could be enforced and that in the bankruptcy court he may be brought before the court for the same purpose. See also Black on Bankruptcy, ((1922 Edition), Section 110.

This Court has so construed the Act. This court in the case of Francis vs. McNeal 228 U. S. 695; 57 L. Ed., Page 1029, where the issue raised was whether Francis was a partner in the firm which was a bankruptcy. Pending the determination of this question the court entered an order confirming a certain agreement entered into be-

tween the parties, whereby Scott, Counsel for Francis, would collect certain rents on his (Francis') individual property and hold the same subject to future determination of this question. Later the Referee found Francis to be a partner and McNeal, who had been appointed Trustee, filed a petition asking leave to take over the individual property of Francis, which upon a hearing was so ordered by the Referee. Later the court affirmed the order of the Referee directing the Trustee to take over Francis' individual property and later Mr. Justice Holmes again affirmed the decision of the lower court and after stating the facts, held:

(1) That the liability of a partner for partnership debts was primary and direct and not collateral, as that of a surety, regardless of whatever priority there may be in marshalling their assets. That this liability is created by the common law, regardless of the Bankruptcy Act.

(2) That ordinarily a partnership cannot be insolvent with one of its members solvent and that the bankruptcy law has not established the principles inconsistent with this rule. On the contrary that Section 5, Clauses a through g contemplate that BOTH PARTNERSHIP AND INDIVIDUAL ESTATES ARE TO BE ADMINISTERED IN BANKRUTCY AND THIS IS TRUE, NOTWNTHSTANDING THE FACT THAT for some purpose these Clauses recognize the entity theory. That the only exception contemplated by the Bankruptcy Act is Clause "h" of Section 5, will allow a solvent partner of a firm where some, but NOT all, are in bankruptcy to administer the estate, and this clause does not import that the partnership can be in bankruptcy and some of the partners out. That the necessary and natural meaning of this language goes no further.

(3) That if the partnership and individual estates together are not enough to pay the partnership debts, the

rational and certainly not forbidden thing to do is to administer them in bankruptcy.

(4) That so far as Vaccaro vs. Security Bank, 103 Fed. 436, is in conflict with the majority decision in re Bretanshaw 157 Fed. 363, that it (meaning the Vaccaro case) is sustained by the stronger reasons and is correct.

We have cited and have stated what we consider this case to hold for the purpose of showing that this Court has not carried the entity theory to the extent which the District Court has carried it, and we submit that this case clearly holds that Clauses "a" through "g" of Section 5, clearly contemplate that both estates must be administered in bankruptcy and the natural consequences of this rule necessitates that upon the filing of a petition in bankruptcy against a partnership, in the very nature of things, and in order to properly marshal the assets and liabilities of the two estates, the individual property must be taken into bankruptcy and held by this court free from any one obtaining liens against it which would prevent the marshalling of assets and result in a preference. In fact, as we read this decision, it holds that it is impossible in the nature of things for the partnership to be in bankruptcy with its partners solvent, and the only time that the entity theory applies is in case where there is a solvent partner, who may then by authority granted him under the Act, administer the estate. If there is a solvent partner, as is pointed out in this case, the firm is not insolvent, and there is really no occasion for bankruptcy for as Mr. Justice Holmes says at Page 1030:

"A judgment could be got and the parnership debt satisfied on execution out of the individual estates."

In fact we are unable to conceive of a case where a partnership could be insolvent if its members, or any one of them, are solvent.

To meet this decision of this Court the Bank contends that the decision of this Court in Francis vs. McNeal, 228 U. S. 695; 57 L. Ed. 1029, is not applicable to this case, because the decision of the same case in the United States Circuit Court of Appeals for the 3rd Circuit, 186 Fed. 481; 26 American Bankruptcy Reports 560, proceeded upon the theory that in that case the court was dealing with a situation where the partnership had been adjudicated upon a petition involving insolvency; that in the case at bar the adjudication of the partnership did not involve insolvency because it was upon a general deed of assignment, great stress being laid on the fact that in the case at bar the adjudication of the partnerships was based on the fact that they had executed a general deed of assignment. In other words, the contention is that the decision of the Circuit Court of Appeals in Francis vs. McNeal was based upon an adjudication involving insolvency, but that in the case at bar the adjudication of the partnerships did not involve such question; hence the decision of neither the Circuit Court nor this court in Francis vs. McNeal applies.

In Francis vs. McNeal the cause was heard upon the petition of the Trustee and the order directing Francis to deliver his property to the Trustee, the answer of Francis and the opinion of the Circuit Court. The Trustee's petition averred that a creditors petition had been filed against the partnership and all its members, alleging that they were bankrupts individually and as a firm, and praying that they may be so adjudicated. That said creditors petition was filed was admitted by the answer of Francis, and the court at page 482 of 186 Federal Reporter, said:

"Consequently we must assume that the act of bankruptcy upon which the adjudication against the partnership was made was one involving insolvency of the partnership."

It appears therefore that the facts in the instant case

and in the Francis vs. McNeal afford striking similarity and that althought the case at bar, as was in the case of Francis vs. McNeal, the act of bankruptcy alleged was on the execution of a general deed of assignment, it is clearly shown by the record in this cause that the act of bankruptcy was one where all the elements of insolvency were present and was one involving insolvency. It appears to us, therefore, there can be no distinction between the two cases.

The further argument is made by the Bank that there can be no bankruptcy of a partnership for insolvency unless it is alleged and proven that the individuals as well as the partnerships were insolvent, that there can be no adjudication of the partnerships without an adjudication of the individuals, who cannot be adjudicated unless they were before the court, as they were not in the instant case. As we interpret this argument, the contention is that there could be no adjudication of a partnership in bankruptcy unless at the time of the adjudication of the partnership it appeared by an inquiry instituted for that purpose that the individuals were also insolvent. In other words, unless a petition were pending against the individuals composing the partnership, process was served on them and by such inquiry it were determined that their assets were not sufficient to meet their liabilities, then no adjudication could be had against the partnership. In this argument, however, counsel completely overlooks the unquestioned principle that the partners are liable **In solido** for the debts of the firm and that the adjudication of the firm as bankrupt is bound in the nature of things to be an adjudication of the individual partners as insolvent. If the partnership was insolvent, the members were bound to be. That was the very point in Francis vs. McNeal. There the firm and some of its members had been adjudicated, but Francis had not been, and the question arose, did he have to turn over his individual property to the Trustee. The Court

held that he did and in summarizing its decision stated that in involuntary proceedings where the act of bankruptcy charged is one involving insolvency of the partnership, there can be no adjudication against the partnership unless it it and all its members are insolvent, and that in such a case, though the adjudication be against the partnership only, or against the partnership and some, but not all of its members, the assets of all members are drawn into the proceedings for administration.

As the learned Judges of the Circuit Court in their opinion in this case (285 Fed. 703) have well said:

"It is impossible for a partnership to be insolvent when the partners individually, or any one of them, is solvent, because every partner is individually liable for the debts of the partnership. A proceeding in equity to marshal assets of a partnership would necessarily be dismissed upon a showing that the complaining creditor could collect his debt in an action at law from one of the partners. Under a creditors bill in a court of equity against a partnership every creditor of the partnership has the right to prove his claim against the individual members of the firm and have it paid from the individual assets, if there be a sufficient surplus over the individual liabilities. Pomeroy Equity Juris. (4th Ed.), Sections 2371, 2372."

A further distinction between these cases is attempted to be made in that in the instant case none of the partners were adjudged bankrupts, while in Francis vs. McNeal some of them were. There is, however, no real distinction. It is true that in the instant case the District Court did refuse to adjudicate any of the individuals, but its decision was based upon a narrow construction of the act to the effect that a partnership was an entity for all purposes, while in Francis vs. McNeal both in the District Court and in this Court the real issue was whether the bankruptcy

of the firm was in effect an adjudication of Francis, or at least brought his property before the court. The Circuit Court and the Supreme Court so held that the adjudication of the firm brought in the individual property of Francis, because the petition was gainst the firm and hence against all of its members, but no distinction was made in either court because Francis, whose estate was involved, was not adjudicated upon the original petition the sole question being the binding effect of the adjudication against the **partnership** and **some, but not all, of its members,** it appearing that the question of insolvency was involved. It is true that in Francis vs. McNeal there was no issue as to the validity of a lien, as in the instant case, but the underlying reason for the basic principle was present; that the members of the firm and their property were in bankruptcy, subject to the rules of administration in bankruptcy.

II.

THE ASSETS OF THE INDIVIDUAL BEING DRAWN INTO BANKRUPTCY BY THE BANKRUPTCY OF FIRM, THEY WILL BE ADMINISTERED AS THE ACTS REQUIRES

If then, Francis vs. McNeal, supra, and the other cases just cited are authority for the proposition that it was the intention of Congress to bring both estates before the bankruptcy court and certainly such was the construction of the act by Mr. Justice Holmes in Francis vs. McNeal, supra, then surely it expected the estates to be administered in accordance with the provisions of the Bankruptcy Act, and not in accordance with some foreign principle or fiction of the law to the effect that a partnership is an entity distinct from the members which compose it, at least, this we submit would be the natural inference in the absence of an expressed enactment.

But there is an express enactment. Clause "F" provides how the net proceeds of the property of the partnership and individuals shall be divided among their respective creditors and Clause "G" provides that:

> "The court may permit the proof of the claim of the partnership estate against the individual estates and vice versa, **and may marshall the assets of the partnership estate and individual assets so as to prevent preferences and secure the equitable distribution of the property of the several estates.**" (Bold face type ours).

The stated intention of this clause is to secure an equitable distribution and prevent preferences. They must be construed so as to carry into effect the purposes of the Act, and this contention is sustained in the case of **Miller vs. New Orleans Acid & Fertilizer Co., 221 U. S. 496.**

In that case a member of a partnership had conveyed certain of his property to the defendant Miller in settlement of a debt which Miller had against him. Under the State Law of Louisana this constituted a preference which could be attacked by both partnership and individual creditors. Certain partnership creditors filed a bill under the State Law which gave them a lien upon the funds so recovered. More than four months after the debt had been paid, but within four months of the institution of the suit to set it aside, the partnership was adjudged a bankrupt, but the individual members were not so adjudged. On his motion as allowed by Section 67-F of the Bankruptcy Act the Trustee intervened in the suit in the State Court as plaintiff in place of the creditors and proceeded with the suit claiming the right to recover the funds, and enforce the lien.

The highest court of Lousiana having held the pay-

ment to be a preference under the State law Miller applied for, and obtained a writ of error to the Supreme Court. In the Supreme Court the question was raised whether the partnership members could complain of the payment in full of a partner's individual debt out of his individual estate since under the method of administration provided by the Act the individual creditors must be paid in full before any of the individual estate could be applied to the partnership debts. The Court held:

(1) That notwithstanding the fact that under the law of Lousiana partnership creditors shared with individual creditors in the distribution of the individual estate of the partnership this rule was superseded by the adjudication of the firm bankrupt, and the bankruptcy act was controlling on this question.

(2) That the Trustee was entitled to recover the fund for the benefit of other individual creditors if there should be any, and that the method of distribution of this fund among the individual creditors was a question solely for the bankruptcy court to determine.

(3) But that if it appears in the proof of the claim against the individual estate that Miller is the only individual creditor, he will be entitled by way of distribution to the full amount paid in by him **because of the method of administration ordained by the Bankruptcy Act.**

This case seems to hold that the lien of the three partnership creditors on the fund was avoided upon the filing of the bankruptcy petition against the partnership within four months, although it was not shown that other partnership creditors would be prejudiced, and that if a partnership creditor obtains a lien upon the estate of an individual partner within the four months, that this lien is a preference if it intereferes in any way with the **manner and method of distribution fixed by the Act.**

If then we are correct in our contention that the Act confers jurisdiction over both estates as an initial proposition, and either expressly of impliedly provides the method of distribution then it undubitably follows that it was not the intention of Congress to allow liens to be perfected during the pendency of the proceedings.

III.

LITIGATION PENDING

The record shows conclusively that from the time of the filing of the partnership petition, and the filing of the list of assets and liabilities of the individual partners that all of the creditors regarded both estates as before the court for settlement. The partners themselves so regarded it as they submitted to the jurisdiction of the court, and filed lists of their assets and creditors which showed them to be insolvent. They then filed an offer of composition. This they had the right to do under the provisions of the Act. The creditors had the right to determine whether they would accept the composition. The formalities of the bankruptcy law as to the offer and acceptance of the composition had to be complied with. Both the bankrupts and the creditors of both estates had the right under the provisions of the law to conduct these proceedings in a legal and orderly manner without liens being perfected during the pendency of the proceedings. Naturally these proceedings require time, and both the partners and the creditors of both estates entered into this litigation over this question in good faith, believing that both estates were before the court, and that they had time to dispose of the question in the manner prescribed by law.

The first offer of composition was filed on September

25th, 1920, and was considered at a number of meetings of the creditors from time to time until November 29th, 1920, at which date an amended offer of composition was made, and this was then considered from time to time and was before the referee, and the District Court until the 20th day of April, 1921, thus the time from September 25, 1920, until April 20th, 1921, the period of time in which the Bank's judgment became four months old was consumed by active litigation and there were no indications until January 6th, 1921, that the Bank would claim a lien upon the individual assets. It is true that Counsel for the Bank stated that he objected to the individual assets being mortgaged to raise money with which to pay the partnership creditors, but not until this pleading of January 6, 1921, was filed were the other creditors advised that the Bank did not regard the individual assets as being before the Court. Clause "G" provides that the Court may marshal the assets so as to secure an equitable distribution. If under these facts and circumstance the Bank is allowed to prevail, the provisions of Clause "G" will be entirely ignored and there will not be an equitable distribution. Especially is this true in view of the fact that although the debt which is now being asserted by the Bank was reduced to judgment both against the firm and the partners, it is in fact a partnership debt. The Referee found that all or substantially all of the money which was advanced on the notes given to the Bank, and upon which it obtained its judgment was expended and used for partnership purposes; that very little, if any, of the money was used for individual purposes of the partners. (Record No.238, October Term, 1923, page 26). This finding of the Referee is presumptively correct. Collier on Bankruptcy, 12th Edition, page 699, and cases cited.

The partnership assets will not be sufficient to pay the partnership creditors, nor will the individual assets be sufficient to pay the individual creditors. (Record No.

283, October Term, 1923, pag 26). In fact, the entire sale of the partnership assets brought only the sum of $908.08, which will hardly pay the costs of administration, much less the many thousands of dollars which the partnership owes.

The lists of assets and liabilities of W. L. Becker, Sr., show that he is individually indebted as an endorser and otherwise in the sum of approximately $30,666.94 and that after the sale of all his individual property, and the payment of the mortgage indebtedness thereon, only $9,077.64 will be available for distribution to his individual creditors. The list of W. L. Becker, Jr., shows that he is indebted as an endorser and otherwise in approximately the sum of $30,336.12, while the sale of his individual assets after the payment of the mortgage indebtedness thereon will leave available for distribution among his individual creditors only the sum of approximately $5,556.32. Thus as the situation now stands after the payment of the costs of administration less than $14,000.00 will be available for distribution among the individual creditors, and nothing will be available for distribution among the partnership creditors.

Under these condition we submit that if the claimant is allowed to recover from the proceeds of sale of the individual estates every dollar of a debt which is in fact a partnership debt there will be no **equitable marshalling** of the several estates, but in fact a most **inepuitable hardship** will be imposed upon the other individual creditors of the individual partners. The act is dual in its operation. On the one hand it operates **in rem** providing for the distribution **of the estates according to well defined principles.** On the other hand it operates **in personam** granting persons adjudged bankrupts a discharge from their debts if they comply with the law in reference to discharge. In this case the question before the Court is not one of discharge, but a question of the proper distribution of the **estates,** and

if as we contend the estates of the individuals are brought into the bankruptcy court for distribution, then we submit that the Trustee's title to the individual estates relates back to the filing of the partnership petition and as the Bank's judgment was recovered within four months of that time the lien thereof is annulled.

IV.

THE ASSIGNMENT OF ERROR SHOULD BE OVERRULED

We have heretofore already discussed to a certain extent these assignments of error and the argument of counsel for the Bank thereunder in our discussion of the general principles applicable to the case and while we do not think the situation merits a further general discussion of these assignments, we do desire to state briefly our views of some of the contentions made under the assignments of error.

(1)

Sections 67 "c" and 67 "f" are to be considered and construed in connection with the other provisions of the Bankruptcy Act

The argument of the Counsel for the Bank in connection with these two sections of the Bankruptcy Act is to the effect that the Trustee has not alleged that the judgment was dissolved because it contravened any of the provisions of these Sections, quoting them and citing athorities to the effect that the party asserting that a judgment is dissolved by bankruptcy must affirmatively allege and bear the burden of proving that the judgment contravenes these two provisions of the Act, and failure to so allege renders the judgment unassailable.

Having fully discussed the condition of the record on the allegations and proof of insolvency, we will not discuss these questions further, but we submit that these two sections do not have the application to the case that Counsel for the Bank contends. We have found no authority and certainly Counsel for the Bank have cited none which would indicate that it was the intention of Congress to give greater efficacy to these two sections than to any other section of the act. We do not think that Congress intended that the validity of liens in connection with partnership bankrupticies should be solely controlled by these two sections and the Section 5 clauses "b" through "g", should be ignored or made subservient to Sections 67 "c" and 67 "f", especially when section 5 deals directly with partnership bankruptcies.

As we have heretofore contended, the contention of the Bank disregards the fact that the petition against the partnership was filed within four months from the recovery of the judgment, the effect of which we have argued at length and which, we earnestly contend, renders the estates of the partners subject to administration in bankruptcy in accordance with the cardinal principles of the act and in accordance with the provisions of Section 5, Clases "b" through "g".

(2)

THE TRUSTEE REPRESENTS ALL FOUR ESTATES

Counsel for the Bank contends that the Trustee of the individal assets cannot be heard to complain of the Bank's judgment because the same was more than four months old when the individuals were adjudicated, and whatever power he has as such Trustee must be claimed under and through this adjudication. The court will bear in mind that the record shows that due to the fact that litigation

was pending over the composition offer, no Trustee was elected for the partnership until after the adjudication of the individual partners, whereupon at the first creditors meeting after the District Court had rejected the offer of composition respondent was elected Trustee of the estates of both partnerships and as Trustee of the individual estate of W. L. Becker, Sr., and that of W. L. Becker, Jr., Hence when the Trustee objected to the allowance of the Bank's claim as a secured claim, he objected both in the capacity of Trustee for the partnerships and as Trustee for the individuals, and it is for the protection and in the interest of an equitable distribution of all four estates, free from preferences, that he conducts this litigation. We are unable to see any force in the contention that the Trustee is claiming through the adjudication of the individual estates, because as a matter of fact, he claims as the representative of all four estates and there is nothing inconsistent in his attempts to have the assets of all four estates marshalled so as to prevent preferences and to secure an equitable distribution of the property of the several esates, and this is true regarless of the fact that the judgment was four months old when the individuals were adjudicated, the effect of which we have already discussed at length.

(3)

THERE ARE OTHER CREDITORS OF THE INDIVIDUAL ESTATES WHO OBJECT TO THE BANK'S CLAIM.

(2) The next contention advanced is that the Trustee of the partnership cannot be heard to attack the Bank's judgment against the individual assets where there is no surplus above the individual debts and the same is not a preference as against partnership creditors. This same contention is advanced under the various assignments of error and in the demurrer and motion to dismiss and with apparently no regard for logical sequence appears at vari-

ous places throughout his pleadings. We will now discuss this contention as it appears under this assignment of error and elsewhere in the brief of counsel for the Bank.

It will be remembered that in this case the debts scheduled by the individual members are classified as follows:

1ST CLASS DEBTS for which W. L. Becker, Sr., was alone liable	$ 5,372.00
Debts for which W. L. Beckner, Jr., was alone liable	6,527.85
2ND CLASS debts for which both were liable with other makers and endorsers	3,900.00
3RD CLASS DEBTS for which both were liable as endorsers for the partnership	27,066.00
Total debts on which there is individual liability	$42,865.85

The debts of the first class aggregate $11,899.85; those of the second and third classes aggregate $30,966.00. The sale of all the individual assets of both partners brought $20,618.00, from which a total prior uncontested mortgage indebtedness of $5,966.04 was paid, leaving for distribution $14,651.96. The total debts of either class plus the Bank's judgment of $5,566.05, aggregates more than the total amount available for distribution, and in making the foregoing caculation, the cost of administration and the thousands of dollars of purely partnership demands which aggregate $56,772.56 (Present record pages 21 and 22) are not taken into account. Nor is the sum of $908.08 which was all that was realized from the sale of the partnership assets. The Referee found that the debt of the bank on which the judgment in question was rendered was incurred for partnership purposes, but regardless of this, or in which class the bank's debt is placed, it is evident that in any

event, there will not be an amount sufficient to pay any creditors in full. Thus the solution of the question in this case favorably to the contention of the Trustee is of vital importance to all of the creditors, those holding purely personal demands, as well as those holding notes of the partnership endorsed by the individual members, and that the bank's judgment in fact results as a preference against both classes of creditors.

Counsel for the Bank on Page 11 of his brief contends that the Trustee occupies the anonymous position of seeking, as Trustee of the partnership, to avoid the Bank's judgment when he admits that if the whole Bank's judgment is collected it will not diminish the amount to be paid to partnership creditors and further that the Trustee is estopped to attack the Bank's judgment against the individuals because his sole authority is derived from the adjudication of the individuals. Counsel for the Bank again overlooks the fact that the respondent Trustee is the Trustee for all four estates and the further fact that he has stipulated and that the Referee has found as a fact that if the Bank's judgment is allowed as a secured claim it will enable the Bank to obtain a greater percentage of its debt than other individual creditors the stipulation of counsel and the finding of fact by the Referee on this point are found in the present record on Pages 9 and 21 respectively, paragraph 5. Counsel for the Bank seems to blandly overlook and brush aside the admitted and found fact in this case that if the Bank is allowed to prevail it will be a serious detriment to other **individual creditors.**

(4)

Counsel for the Bank further assigns as error the overruling of his demurrer, various motions to dismiss and petition for review found on Pages 3, 6 and 23 respectively of the present record. Upon examination of the questions raised by this demurrer, motion and petition to review it

can be readily seen, that these papers in effect and upon final analysis raise the same questions as are raised in the other assignments of error as we see no necessity of discussing them further as such.

(5)

On Page 4 of the petition for the writ of certiorari in this case the Bank raises the question that the Circuit Court erred in not holding that its first decision was reversed by the decision of this court rendered on May 26th, 1924, (265 U. S. 365). As we interpret this assignment of error the Bank contends that when this cause was appealed to the Circuit Court the second time it should have decided that the decision of the Supreme Court was final and binding instead of deciding as it did (4 Fed. (2nd) 240) that the decision of the Supreme Court only passed upon the question of insolvency and did not decide the cause on its merits. In our judgment a complete answer to the Bank's contention is the fact that after the Circuit Court had rendered the decision found in 4 Fed. (2nd) 240, the Bank applied for a writ of certiorari to the Supreme Court who denied the writ, (268 U. S. 693) thereby holding that its first decision was not final, was not an adjudication upon the merits and thereby approved the course authorized both by the District Court and the Circuit Court in allowing an amendment of pleadings and the taking of evidence on the issue of insolvency. It seems to us too plain for argument that after the Circuit Court held that the order of the District Court allowing the amendment and taking of proof was proper and the Bank was denied a certiorari to that decision that it cannot now again raise the same question which was formerly before the Circuit Court, and before the Supreme Court on the Certiorari and decided adversely to the Bank. It is our contention that the right of the Trustee to amend the pleadings and take further proof was forever put at rest by the refusal of the certiorari (268 U. S. 693).

(6)

Throughout its pleadings the Bank raises the question that the Circuit Court committed error in holding generally that the adjudication of a partnership is ispo facto an adjudication of the individual members of the firm. We contend that the Circuit Court was correct in so holding but we go one step farther and respectfully submit that regardless of the correctness of this decision as a correct proposition of law generally that in the case at bar and under all its facts and circumstances the lien claimed by the Bank is invalid.

As we have heretofore argued at length in this brief the court and parties interested in the litigation from the date of the filing of the petition against the partnership regarded both individual and partnership estates before the the Court to be marshalled, administered and distributed in accordance with the Bankruptcy Act. The matter was so treated throughout all of the extensive litigation involving the composition and it was not until the litigation over the composition had been decided adversely to the bankrupts that they as individuals filed their voluntary petitions and adjudications were had thereon. Had there been the slightest intimation by the Bank or from any other source that all four estates were not then before the Court or that after the litigation over the composition was concluded the Bank would raise the question that the individual estates were not before the Court, it does not seem reasonable to assume that the other individual creditors would not then have filed involuntary petitions against the individuals and had them adjudicated within four months of the rendition of the Bank's judgment. On the contrary it is reasonable to assume that if the other individual creditors for one moment thought that the litigation over the composition would serve to validate the Bank's judgment that some steps would have been taken to prevent the same.

It is respectfully submitted that holding the Bank's lien to be valid will result in the Bank taking advantage of the lapse of time caused by the litigation over the composition and that the result will thus be achieved not contemplated by the Bankruptcy Act, whose prime purpose is to secure equality among creditors, prevent the perfection of liens, and insure such marshalling of the assests of the bankrupt as will result in an equal and equitable distribution of the assets.

V

THE AUTHORITIES CITED IN THE BRIEF OF COUNSEL FOR THE BANK DO NOT APPLY.

Counsel for the appellant lays great stress upon the case of Meek v. Centre County Banking Company, 268 U. S. 426, 45 Sup. Ct. Rep. 562, claiming that it is conclusive in the case at bar. We respectfully submit that it is not in point and in fact has absolutely no bearing upon the problem now before this court.

The facts of this Meek case as stated in the second branch of Mr. Justice Sanford's opinion disclose: That Shugert who was a member of a partnership composed of himself and others trading as Centre County Banking Company filed in an "anomalous and modified fashion" a debtor's petition and a partnership petition alleging that he and the partnership were insolvent and both were willing to surrender their property and desired to obtain the benefits of the bankruptcy law; that the other members had not offered to join in the petition and he was not informed of their intention in the matter. The petition as filed however did not allege that either the partnership or the other partners had committed any act of bankruptcy. The petition then prayed for process and an adjudication of Shugert, the partnership, and the other parties (called in the opinion

defendants) be adjudged bankrupts. To this hybrid petition the other parties (defendants) appeared specially and moved to dismiss on the grounds among others that it was not authorized by the Bankruptcy Act, and the court had no authority to adjudge either the partnership or the non-consenting partners.

The court held:

(1) That a partnership may be adjudged a bankrupt as a legal entity.

(2) That a partnership cannot be adjudged a bankrupt except upon its own voluntary petition or a petition filed against it by a creditor.

(3) That Francis v. McNeal, supra, only involved the question of whether in a bankruptcy proceeding in which a partnership had been adjudged bankrupt on a petition filed by creditors the court might administer the separate estate of a partner who had not been adjudged bankrupt individually.

(4) That Shugert's petition could not be treated as the voluntary petition of the partnership because he alone and not the partnership filed it.

(5) That Shugert's petition could not be treated as an involuntary petition against the partnership because such petition could only be filed by creditors and Shugert was not a creditor.

(6) That the authority conferred by Congress upon the Supreme Court to prescribe rules, forms and orders for carrying the Bankruptcy Act into effect did not authorize additions to its substantive provisions; that the portion of General Order No. 8 which provides for the adjudging a part-

nership a bankrupt or administering its property upon the **petition of one of the partners alone** (bold face type ours) does not relate to the execution of the act itself and is therefore without statutory warrant and is of no effect.

(7) That the motion of the non-consenting partners to dismiss the Shugert petition should have been sustained.

The difference between this case and the case at bar is manifest. In that case there was no adjudication. In the instant case there was an adjudication. The question in that case did not arise or did it involve the effect of an adjudication of the partnership as a bankrupt. On the contrary it simply dealt with the right of one partner to file a petition in his own behalf and in behalf of the other members of the firm who did not consent thereto. The Supreme Court held that such course was not authorized either by the Act or the General Orders in Bankruptcy. In the instant case adjudication has been made and the question now before this court is the **effect** of such adjudication, and not the right of one partner to file a voluntary petition in behalf of the firm. In that case no question arose as to the validity or priority of any liens. In the instant case the real question at issue is whether or not the Bank's lien is valid and whether or not the Bank has the right to collect all of its debt while other partnerships and individual creditors are allowed to collect a small part of their debts. In that case no question arose as to the **administration** of an estate in bankruptcy but simply the question of the institution of such proceedings. In that case the other members of the firm were actively and aggressively objecting to the adjudication denying the right of their co-partner to file the petition. In the instant case no such question arises. Both of the partners and the creditors are here admittedly and of their own volition impleaded in a controversy determining the administration and division of the bankrupts estate.

It is true that Mr. Justice Sanford did say in the opinion that a partnership may be adjudged a bankrupt as a distinct legal entity. The learned Judge however does not in this opinion state the effect of such adjudication. No such question was before the Supreme Court in that case and it is respectfully submitted that the decision hence has no bearing upon the instant case.

As we have endeavored to point out in the argument heretofore stated while courts have held that a partnership may be adjudged a bankrupt as a legal entity, such adjudication does not for all purposes completely abrogate and annul the other provisions of the Bankruptcy Act. On the contrary we respectfully insist that the adjudication of the partnership in the instant case was in effect an adjudication of the individual members and such adjudication having been made it necessarily follows that the assets of the bankrupts must be distributed in accordance with the principles and rules of the Bankruptcy Act, which prevents the perfection of liens thereon, preferences or an inequitable marshalling of the partnership and individual estates which this court has held and which holding remains uneffected by the decision of the Supreme Court in the case of Meek v. Centre County Banking Company, supra.

The only other case cited by counsel for the Bank is the case of Myers vs. The International Trust Company decided by this Court on February 21st, 1927, Advance Sheet Supreme Court Report, March 15th, 1927, Page 417. We have carefully considered this decision but fail to see that it is at all in point. As we interpret it, it only decided that a composition in bankruptcy proceedings against a partnership does not release the individual liability of the partners upon their individual endorsements of partnership paper where the creditors of the individual partners as such are not listed and for whom no consideration is deposited. In fact in the foot note to the case at Page 419

it is stated that the Court need not determine whether the adjudication of the bankruptcy of the partnership involves an adjudication of the bankruptcy of the individual partners, citing Francis vs. McNeal, supra; Liberty National Bank vs. Bear, supra and Meek vs. Centre County Banking Company, supra.

CONCLUSION

In conclusion, it is respectfully submitted:

(1) That the filing of the petition against the partnership and the adjudication thereon was in effect an adjudication of the individual members, or at least carried their assets into bankruptcy. That the assets of the individual members being in bankruptcy, it was the intention of Congress that the assets of both estates be distributed in accordance with the method of distribution ordained by the Bankruptcy Act, so as to prevent preferences and to secure and equitable distribution of the different estates among the respective creditors.

(2) That this being the proper interpretation of the Act, it was the intention of Congress that its provisions should be carried into effect in such manner as to allow the Court to administer the properties of the various estates untrammeled by litigation or proceedings which would result in the perfection of liens against either estate.

(3) That none of the errors assigned by the Bank or the arguments of counsel thereon state any valid reasons why the decision of the learned Circuit Court is not proper.

It is therefore respectfully submitted that the de-

cision of the United States Circuit Court of Appeals for the Fourth Circuit should be affirmed.

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JAMES A. BEAR,

Of counsel for Respondent.